Virginia Department of Social Services
Division of Licensing Programs

Adverse Enforcement:

Goals, Principles, Guidelines, and Office Procedures

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Destroy previous edition. Provide a copy of this document to each inspector. Contents are to be reviewed with all inspectors when issued or updated. New inspectors are to be trained in the concepts and procedures during basic orientation and training.

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Annotated Glossary: Regulatory Terms In This Document

Administrative appeal: A broad term encompassing the appeal process available to a licensee or applicant pursuant to the Administrative Process Act when a sanction is imposed by the agency. Final decisions within the administrative appeal channel may then be appealed to the court system.

Administrative hearing: A hearing, quasi-judicial in nature, conducted by an independent attorney appointed by the Supreme Court of Virginia to hear evidence by the Department and any facility against whom it has taken involuntary closure action in the form of denial of a new or renewal application or revocation of a license during its effective dates. The hearing officer then prepares a report of findings and recommendations, to which attorneys representing the facility and the department's licensing program may file exceptions. The recommendation, which is not binding, is directed to the Commissioner, who then makes the final case decision that may be appealed to Circuit Court.

Consent/Settlement Agreement: As provided in the Administrative Process Act, this is an avenue within the appeal process to settle an adverse enforcement case through negotiation. Once a consent agreement is in effect, it is enforceable; a breach of the agreement is grounds for revocation, although the licensee retains the right to appeal that finding/decision. Consent agreements are available from informal conferences and, accordingly, for both intermediate and ultimate sanctions, although they are more likely to be proposed by the licensee in revocation/denial cases.

Consistency in decision-making is the result of staff's weighing an analysis of the totality of the given situation and a consideration of previous decision-patterns in similar situations before determining the best decision in a particular case. Consistency does not mean uniformity, because no two situations are ever fully like. Consistency means using regulatory enforcement principles in a similar way to address situations according to their similarities as well as their dissimilarities. For example, because of the risk and seriousness, it might be considered reasonable to impose a fine on a facility that lost a child but made immediate and reassuring systemic corrections. On the other hand, revocation might be considered reasonable if a facility lost a child and also had a poor grasp of the causes, a weak management staff, and a poor track record on follow through.

Corrective Action Notice: This is a summary of violations, organized according to an analysis of the systemic nature of violations and any trends noted, that provides the licensee with steps and timelines to bring the facility into full and sustained compliance. It is intended to be used within a conference called to underscore the seriousness of the facility's licensure status. Used early, before serious risks manifest, it may serve to focus a licensee's attention on the potential seriousness of his deficiencies, on the likelihood of sanctions if *prompt* improvement is not demonstrated, and on the need to take a "big-picture" approach to correcting the underlying causes of the deficiencies.

Enforcement: The generic term for all regulatory activities directed toward assuring compliance with applicable laws and regulations. Technically the term embraces both positive or supportive activities as well as adverse enforcement, although in common usage the latter meaning is more prevalent. Within this range of meanings, in this document **Adverse Enforcement** refers to the application of an intermediate or ultimate sanction that is subject to appeal by the licensee.

Individualized enforcement plan: A plan used to assess risks and manage enforcement strategies when a facility is experiencing significant violations. Such plans are based on a diagnostic assessment of the nature, scope, and underlying causes of the violations and an assessment of the overall risk to consumers. The plan will briefly describe actions the licensing office will take to restore compliance or otherwise reduce consumer risk, including timeframes for interventions and reassessment. The plan's action steps should link to violations found during complaint investigations or other inspections. (Example: *Discuss pattern of violations in infant-toddler rooms with director; offer TA/referrals and elicit plan for staff retraining and supervision; Unannounced inspection within 60 days, allow extra time to observe feeding and diapering routines all I-T rooms; Note: consider sanctions if violations occur in subject areas after discussion held*.)

Informal Conference: The first step in administrative appeals. An informal conference is chaired by agency staff (usually the originating licensing administrator). The conference has two purposes. One is to give the applicant or licensee an opportunity to refute findings/interpretations made by licensing staff when these formed the basis for the adverse decision. The second purpose is to provide an avenue to propose a settlement agreement concerning violations in lieu of continuing the sanction and appeal process. Intermediate sanctions, including monetary fines, do not lend themselves very well to the concept of a "settlement agreement" and would rarely be settled unless the facility is persuasive that the violations were incorrect, misinterpreted or less serious than the division believed at the time the sanction was imposed.

Injunction: As it pertains to licensing practice, an injunction is a court order to close a facility. The Commissioner will petition the court to enjoin the operation of a facility that (a) continues to operate without a license when one is required, or (b) is considered likely to endanger consumers if allowed to operate during an administrative appeal of a denial or revocation action. Staff of the Division of Licensing Programs request the Commissioner to seek the petition and, if approved, staff of the Attorney General draft pleadings for the judge's ruling.

Inspection: An on-site compliance investigation to gather information and evidence needed to make regulatory decisions related to issuance, continued compliance with the terms of licensure, or complaint resolution. An inspection includes variety of information-gathering techniques, e.g., interviewing facility personnel, customers, and others knowledgeable of the issues under consideration; observation of services and activities in progress; examination of the physical plant and premises, equipment, supplies, study of pertinent records and documentation, etc.

Investigation: All activities, including but not necessarily limited to on-site inspections, used to

gather information and evidence sufficient to make regulatory decisions related to issuance, continued licensure, and complaint resolution.

Involuntary closure: Using enforcement to close a facility. Most often, the involuntary closure instruments are denial or revocation of a license. Less frequently, an injunction is the instrument to effect involuntary closure.

Problem Solving Conferences: A series of conferences and desk reviews made available through the agency's procedural regulation to respond to concerns expressed by licensees/applicants concerning licensing procedures, interpretation of regulations, or the actions of licensing staff when those concerns cannot be resolved in discussion with the assigned licensing representative.

Sanction: The application of a specific and appealable regulatory consequence for failing to attain or maintain compliance. The term does not include issuance of a provisional license but does include both intermediate and ultimate sanctions. **Ultimate Sanction** includes any activity directed toward involuntary closure of the facility, e.g., denial, revocation, and petition to enjoin operation. **Intermediate Sanction** includes any statutorily prescribed action not directed toward involuntary closure but instead toward motivating compliance or nullifying a benefit of non-compliance.

Special Order: As provided in law and applicable only to intermediate sanctions, it means that the administrative appeal does not include a provision for administrative hearing, i.e., once the informal conference step is concluded the Commissioner issues the final order.

Systemic: An adjective applied to violations and corrections to indicate a focus on causal conditions related to the basic program design and management.

- Systemic violations occur because one or more major components/systems in the overall program is broken or flawed. For example, staffing (staff are not well selected, well trained, well supervised, and supported by a system for emergency/relief staff); maintenance (equipment is not regularly inspected and serviced within a soundly planned preventive maintenance program, repair and replacement records are not kept/consulted to support preventive maintenance, nor are plans in place for prompt repair in the event of unforeseeable breakdown); record-keeping (records are not regularly maintained according to clear assignments and methods); etc. In a systemically flawed operation:
  - violations tend to be repetitive;
  - violations show a pattern that mirrors the number of components that are systemically flawed;
  - corrections tend to address symptoms rather than causes;
  - management oversight-- particularly in terms of planning, delegation and monitoring -- tends to be short-sighted or ineffectual;
  - staff tend to be confused or demoralized.
  - Both people and components may appear to be "working against" one another, or at least are

not working effectively with one another, creating an atmosphere of disorder.

- Conversely, systemic corrections:
  - establish clear lines of authority and accountability,
  - execute sound program management plans and methods for all program and program support components,
  - *regularly monitor* operations to assure that the systems are working smoothly, and
  - establish communications designed to assure component coordination.

In systemically well-managed facilities, one should see only occasional, non-repetitive violations caused either by unusual convergence of events or by relatively minor human lapses in an otherwise well-ordered program.. Moreover, any such lapses are quickly detected and corrected by the facility, which will always reexamine its methods and procedures to determine whether revisions are needed to prevent future breakdowns.

Violation: Failure to comply with a requirement established in law or regulation; sometimes called "non-compliance." Only the agency with lawfully established responsibility for enforcement may cite a violation or require its correction.

Violation Notice: The action that will be taken by the licensee to correct any cited violation by the date acceptable to the inspector. Agency procedure always requires a deadline for correction but does not require the facility to describe the measures that will be taken when the violation poses low risk, although the facility is always free to include the corrective measures.

I. Introduction

Staff time to maintain consumer protection in marginal facilities through heavy monitoring and extensive, continual on-site support is not available. Moreover, it is not in consumers' best interest for licensing staff to permit non-complying facilities to continue in operation beyond a short period — and then only if the risks are reasonable and there is evidence that the facility can regain strong compliance. This document is intended to give licensing staff, particularly operations staff, added guidance about enforcement expectations and to assist them to make sound and consistent case decisions. This guidance is directed to helping staff:

- to stay focused on effective public protection decisions in selecting enforcement strategies, and,
- to make only wise investments of whatever technical assistance time can be made available for on-site provider support.

Enforcement cannot be approached with a rigid cook book. Each set of case variables will be different. Decisions and strategies must be tailored to case-specific variables. General goals and principles can be articulated, however, as a means of improving the effectiveness and consistency with which staff undertake this most difficult of all licensing functions. That is the purpose of this document.

The division and department have never been and do not propose to become unreasonable or unduly heavy-handed in the use of adverse enforcement. Commitment to provider support services remains strong. Historically, though, the division also extensively used on-site training, consultation and extra monitoring to contain risks while trying to salvage facilities that were not in substantial compliance. However, significant changes have accumulated in recent years in the following areas:

- statutory tools and requirements,
- work methods, and,
- workload.

Accordingly, methods of adverse enforcement methods need to be reviewed and revised regularly.

II. The Purpose of Adverse Enforcement

The purpose of adverse enforcement is best understood as simply another aspect of the purpose of licensing. The purpose of licensing is to protect consumers through risk prevention and reduction. This purpose is accomplished in three fundamental provisions of every licensing law.

1. A licensing law first prohibits everyone from performing an activity as it is specifically defined in the law. That is, the law first assumes that the defined activity cannot be safely performed by the general public.
2. The licensing law then provides a means for licensing to selectively lift that general prohibition. That is, the law assumes that certain individuals may safely be entrusted with the responsibility of providing the otherwise prohibited activity upon demonstration that they meet pre-determined eligibility conditions, i.e., licensing standards and other applicable provisions in law.
3. Lastly, the law assigns an agency to administer the provisions of the licensing law and other applicable Code provisions. The agency's responsibilities include those related to promulgating licensing criteria (standards), those related to enforcement within the directions of the licensing law, and those related to suppression of illegal operations.

Hence, the licensing inspector's role is to determine objectively whether an applicant or licensee meets pre-set criteria defined in applicable laws and regulations. Accordingly, licensing, including the exercise of all adverse enforcement provisions, is not about punishment. Licensing is about recognizing when applicants and licensees have adequately met all criteria necessary to earn the *privilege* of performing the otherwise prohibited activity.

The inspector's assigned role is to protect consumers by bringing about timely and dependable compliance with applicable laws and regulations. Sometimes this can only be achieved by using the tools necessary to deny or revoke the privilege of licensure. Usually, however, other tools including positive enforcement methods and available intermediate sanctions, are appropriate and effective.

The methods of licensing are all aimed at risk-reduction. There are, however, many forms of risk reduction:

- Developing licensing standards that, if followed, reduce group care risks;
- Applying those standards during issuance, monitoring and complaint inspections, and reflecting those standards in case-level decision-making, including the application of intermediate and ultimate sanctions;

- Providing consultation, training and other support services to improve the skills of applicants and licensees;
- Working collaboratively with other regulatory and service agencies in common interest areas;
- Assisting to promote the availability and adequate supply of safe care through efforts to attract, support and retain competent providers and to help them remain motivated to abide by requirements. Note that a number of the associated methods have already been mentioned above and include: reasonable rules; a reasonable enforcement posture; developing/offering training and technical assistance both on-site and in group activities; outreach and collaboration aimed at recruiting providers; and, consumer education.
- Using adverse enforcement appropriately to prevent the entry or continuation of licensees who cannot or will not maintain satisfactory compliance. Petitions for injunctions are used to suppress illegal operations and, when necessary, also to prevent a dangerous situation from continuing during administrative appeals.

It is obvious that these categories of activities act singly to protect the public and to promote success among licensees. It may be less apparent that these activities also act *collectively and interactively* to protect the public.

Moreover, the way the agency manages the *dynamics* of that collective impact is critical to maintaining public protection and public support for the licensing program. For example, if the agency does not have reasonable regulations, a fair-minded enforcement stance, and a reputation for trying to help providers succeed, adverse enforcement actions are less likely to be supported. That is, if public sees licensing as only reducing but not also promoting needed care, a backlash might result, causing the consumer protection mission to lose ground overall. On the other hand, if the agency demonstrates great reluctance to resort to adverse enforcement, then the potential gains from inspections, technical assistance and other forms of positive enforcement will be lost or diminished, leaving consumers less protected and eroding public confidence in the agency's effectiveness.

In short, consumers are placed at risk unless the agency uses both positive and adverse enforcement in a planful, appropriate, synergistic way.

The preferred objective of adverse enforcement is to salvage the facility ***without*** causing undue or prolonged discomfort or heightened risks for consumers. When that objective is not achievable, the objective is to force closure as promptly as possible within the provisions of law.

III. Review of Key Enforcement Methods Available

Statutory framework

- Conditional license, limited to a total of six months
- 1-year to 3-year regular licenses (except for Interdepartmental programs), according to compliance performance
- Provisional license, limited to a total of six months (except that it may be for 12 months if approved by State Fire Marshal in the case of adult facilities only)
- Workload adjustment provision, 6 months change in licensure period (Chapter 10 only)
- Sanctions provided:

Children's programs

By Special Orders (omits administrative hearing stage)

- Place on probation
- Reduce capacity
- Prohibit new admissions
- Post notices of probationary status, provisional license, and denial/revocation (Note: the General Procedures regulation requires posting of inspection findings.)
- Mandate training
- Assess civil penalties of not more than $500 per *violation*
- Require licensees to contact custodial parents or guardians in writing regarding health and safety violations
- Prevent licensees who are substantially out of compliance from receiving public funds

By Full Administrative Process Act Provisions (includes administrative hearing)

- Denial (includes a six-months restriction on re-application unless waived by Commissioner)
- Revocation (includes six-months restriction on re-application unless waived by

Commissioner)

Adult Care Residences

By Special Order (omits administrative hearing stage)

- Reduce capacity
- Prohibit new admissions
- Post notices of finding/adverse actions (via *General Procedures* regulation)
- Fine, maximum $500 per *inspection*

By Full Administrative Process Act Provisions (includes administrative hearing)

- Denial (includes 12-months restriction on re-application unless waived by Commissioner)
- Revocation (includes 12-months restriction on re-application unless waived by Commissioner)

Adult Day Care Centers

These were unchanged by 1998 legislation and remain as follows:

By Full Administrative Process Act Provisions (includes administrative hearings)

- reducing the licensed capacity;
- restricting or prohibiting new admissions
- petitioning the court to impose a civil penalty
- revoking or denying renewal of the license (includes 12 months restriction on re-application unless waived by Commissioner)

♦ Full Administrative Process Act appeal provisions
  - Informal Conference (emphasis on potential to develop consent agreements and simplifying or averting administrative hearings
  - Administrative Hearing
  - Court appeal

♦ Petition for injunction (Applies to suppression of illegal operations without respect to quality of care. Applies to regulatory enforcement when the department believes there is imminent risk and that consumers would be placed in jeopardy during the appeal processes.)

♦ Mandated monitoring inspections -- semiannual for all facilities except for ACRs where

amendments enacted by the General Assembly in 1999 established the following schedule:

- a six-month license requires two inspections in six months,
- an annual license requires three inspections per year,
- a 2-year license requires two inspections per year, and
- a 3-year license require one inspection per year

Internal administrative procedures

- Use of compliance plans *aimed at causal/systemic, not symptomatic*, correction.
- Case decision-making methods and requirements for differential issuance decisions and special requirements for given status of cases, e.g., monitoring schedules.
- System of delegations, reviews and approvals for various actions.
- Prioritization scheme for determining choices when required regulatory actions must be late or absent because of staffing shortages, especially when non-compliance with statutory requirements is occurring.
- Provisions in General Procedures, including provision to call for problem-solving conference.
- Internal procedures, including and procedures with AG staff to manage informal conferences, administrative hearings and court appeals.
- Use of special conferences or correspondence, e.g., to involve boards of directors or owners.
- Use of corrective action notices prior to invoking adverse enforcement.

IV. Principles and Guidelines for Case Decision-making

1. The first step is always to gather all the necessary information to assess an identified enforcement problem. Only then, can licensors plan a realistic approach for achieving prompt compliance. That is, the strategies for dealing with providers must be based on an assessment of each provider's:

    - Willingness to comply

        If there is demonstrated unwillingness to comply, also assess the nature, extent and probable causes; then gauge the likelihood that the provider might respond to strategies aimed at motivating compliance.

    ♦ Ability to comply; consider:

        - The breadth and depth of any ability deficits,
        - The nature of the resources and tools needed to overcome resistance to compliance or skill deficits,
        - The availability of those resources and tools, and
        - A judgment about whether the consumer risks are acceptable over the time projected for response.

2. A licensee is entitled to notice and to reasonable opportunity to make correction unless there is clear and immediate risk to consumers.
3. A licensee is not entitled to continue to violate regulations.
4. If there is evidence of abuse or serious neglect committed or condoned by the licensee, enforcement should almost always move directly to revocation. A licensee is entrusted with the protection of vulnerable people. *If the licensee cannot be trusted not to inflict harm knowingly, there is no basis for licensure.* (Very rarely, an exception might be considered (a) if there is no statutory barrier and (b) if there are ***compelling*** mitigating circumstances such to persuade a reasonable person (*i*) that there is little or no reason to expect a repetition or (*ii*) if a fool-proof means of completely removing the licensee from opportunities for repetition can be designed and enforced.)
5. Accordingly, no consent agreement for situations involving licensee abuse/neglect is acceptable unless it includes a logically effective means of protecting consumers *from* the licensee — usually a very short-term arrangement to give the licensee time to sell the facility. Under these circumstances, the licensee will be barred from the premises and an alternative management structure put in place. [Note: (a) In children's facilities, a founded CPS complaint bars licensure

or service in a facility, but there is no parallel in adult facilities. (b) This guideline statement and #4, above, should be considered even if there is no CPS/APS finding when there is a violation of regulatory requirements that inherently create abuse/neglect.]

6. Consent agreements are less costly to pursue and can be highly effective in terms of preserving and improving care sites ─ but ***only*** if they are:
    - used timely,
    - carefully crafted *to assure that the **licensee** corrects the causes* of violations, and
    - monitored by both licensee and licensing staff to detect and react promptly to any breakdowns in the agreement and/or recurrent violations.
7. Intermediate sanctions are available to be used when appropriate. For purposes of selection, the available sanctions can be viewed as falling into several general categories, such as risk reduction, consumer warnings, and some that may appear to be punitive. The latter types of sanctions are, however, actually aimed at gaining motivation and/or attention (see #14) or are aimed at nullifying a financial incentive to violate. Intermediate sanctions present a conceptual conflict with regulatory theory if they are used by the agency as punishment, which is not the role of licensors. That is, a monetary fine might be considered and crafted as compensation rather than punishment. For instance, the fine could be conceptually linked to the number of extra inspections the facility has "cost" the agency, or it could be linked to the principle of restitution of unwarranted profit achieved through violations that deprived consumers of a benefit in the regulations. It could also be considered an effort to motivate/gain attention. The point is that the agency should not consider itself in the business of punishing violations when its real business is evaluating and achieving compliance. That is*, a sanction is never in lieu of compliance; it is to ensure compliance*.

   Intermediate sanctions that can be carried out by means of special orders have the additional advantage of potentially yielding faster beneficial results for consumers. Intermediate sanctions may be presented in conferences with the licensee as a potential alternative to more drastic action but, in any event, must be presented as part of an expectation for the facility to attain strong, immediate and sustained compliance.

8. The full array of adverse enforcement tools includes some that could appear to fall into a natural escalation sequence. There is, however, *no* obligation to use them in any particular sequence. When warranted, *more than one* intermediate sanction may be employed at once. However, if the imposition of an intermediate sanction (or combination of sanctions) does not yield quick and satisfactory results, it is likely that denial or revocation should follow at once. That is, repeated use of intermediate sanctions is *not* the logical response to a licensee's failure to use the compliance opportunity afforded in the application of an intermediate sanction — it extends risk exposure and suggests a lack of enforcement resolve, or, in the case of fines, could suggest that a facility can violate as long as it pays for the privilege. An

individualized enforcement plan should use the action or sequence of actions calculated to bring about compliance in the shortest time that is possible and reasonable to the circumstances. Again, an intermediate sanction is never in lieu of compliance but rather is an effort to ensure compliance.

9. Technical assistance without good results is a misuse of licensing staff time and not in consumers' best interest. The purpose of technical assistance is to help the licensee achieve compliance -- not to use licensing resources to "prop up" a poor operation.

10. Extended investment of licensing staff time in technical assistance is simply not an option with the current workload, even for potentially salvageable providers, particularly at a time when staff are hard-pressed to maintain full statutory compliance for basic licensing functions.

11. Practical, astute decision-making about whether to issue the first license is crucial to safeguarding consumers and to reducing the division's total burden of enforcement problems. Try to dissuade ill-prepared inquirers; refer them to other sources of assistance if appropriate. Deny applicants who are unable to demonstrate satisfactory compliance with all pertinent standards *upon opening.* The conditional license is solely to provide time for the applicant to demonstrate compliance with those standards that cannot be judged except after the facility is in full operation. *If the new licensee slips during the conditional licensure period, deny renewal.* Full and continuous compliance is always the expectation. Consumers should not bear unwarranted risk burdens while a provider learns the business.

12. Escalate the enforcement plan promptly if there are repeated violations. Repeated citations and warnings without decisive follow-through merely teach the licensee to believe no consequences will ever occur. Failure to follow through also exposes consumers to pointlessly extended risks and wastes staff time in added inspections and complaint investigations.

13. Do not assume that the licensee understands the situation or appreciates the seriousness of the situation. Make sure that he or she does. Confronting a problem, in a direct but professional manner, is necessary to move toward a solution.

14. Generally speaking, people do not modify their behavior until there is a SEE (Significant Emotional Event) that forces their attention on the need to change. Getting the licensee's attention on the seriousness of problems is essential if compliance planning is to succeed. Most providers pay attention at the level of the violation notice. Some may not take the situation seriously until you call a conference in your office and lay out their options and yours. Others will not understand the message until they receive a revocation letter.

15. Because providers differ in when their SEE occurs, remember that ***sincere*** problem-solving or consent agreements may be appropriate at any point in the adverse enforcement process. Do not become so invested in the adverse enforcement process that opportunities for achieving compliance (provided it is prompt and systemic) are rejected without just cause.

16. Early in the identification of significant compliance problems, be sure to get the attention and involvement of the responsible people, i.e., decision-makers. That is, do not continue to deal with

facility staff after it is clear that sufficient progress is not occurring. Write or meet with the licensee to get commitment to an effective compliance plan. If that commitment is not forthcoming, escalate the plan of enforcement.

17. Do not become so obsessed with building a "bullet-proof" case that timely action is delayed to the detriment of consumers. Focus on the central problems, then assemble your evidence and documentation carefully and professionally. It is often better to discard incomplete or shaky evidence in order to move ahead than to try to perfect all the points of concern. “Perfect” evidence to support “infallible” conclusions is also not necessary. Licensing cases are decided at the level of “preponderance of the evidence.” It is also possible to amend and expand the grounds for adverse enforcement actions already underway; this can be used to add later findings without unduly delaying the action.

18. Prepare the adverse action letter/document carefully and accurately. It wastes time to send drafts that are ill-organized, do not cite standards accurately, do not cite obviously related standards, that are improperly formatted or ungrammatical, etc. Moreover, the document must tell a complete story for people unfamiliar with the case, which most of its key readers will be. The letter is a legal document that must be correct. It is the job of the inspector and licensing administrator to make it so. Central office staff cannot redraft adverse action documents in the current volume.

19. Do ***your*** job. Do not base your decisions on what you ***think*** others may do. Inevitably, some recommendations will be returned for additional work. Inevitably, some decisions will be reversed on appeal. Whether or not you agree with managers or hearing officers on one case must not deter a candid professional appraisal and recommendation on your next case.

20. Use one another as consultants to achieve greater enforcement effectiveness because you are the experts. Don't deny or minimize enforcement problems — not to self, not to managers, and not to colleagues. Share problems so that you can learn from one another and from grappling with enforcement challenges. For example, "staff" problem cases, role-play to prepare for hearings and conferences with licensees, use telephone conferences to see if your colleagues in other offices have invented new approaches, etc. As a profession, licensing is lonely enough; don't try to perform the hardest regulatory function of all, adverse enforcement, without the involvement and support of your peers and managers.

V. Procedures for Intermediate Sanctions

The 1998 General Assembly provided “special orders” to allow expedited handling of all *intermediate* sanctions in all settings except adult day care centers. Note that special orders do *not* apply to revocations/denials. The legislation that established special orders eliminated the administrative hearing step in the appeal process and specified that imposition of monetary fines must not be delegated. Accordingly, the internal steps necessary to implement special orders are similar to procedures already in place for revocations and denials of licensure, except for omitting administrative hearing steps in those procedures.

Please note that, in addition to omitting adult day care centers, the legislation was enacted with significant *differences* in the children's and adult care residence programs.

Child Welfare Agencies

The legislation has the following stipulations about special orders:

- they are limited to 12 months duration
- they are reserved to a violation that ". . . adversely impacts the health, safety or welfare of children in the. . ."

The legislation permits the following sanctions when the associated conditions are met. (Note that the language does not preclude using two or more sanctions concurrently. Neither does it preclude applying an intermediate sanction concurrently with a revocation or denial if the circumstances warrant.)

1. "Place a licensed child welfare agency on probation upon finding that the licensee is substantially out of compliance with the terms of its license and the health and safety of children are at risk.”
    - Note: Probationary status has not been used to date but should be considered when a facility on a regular or extended license slips and is performing in a way that is comparable to a facility on a provisional license. Standing instructions have long required inspection staff to monitor such a facility as if it were on a provisional license. Thus, while the probationary status sanction would not increase regulatory oversight, it does alert parents to the need to pay increased attention. If the facility does not come into substantial compliance promptly, and

no longer than six months, evaluate the need for adverse enforcement.

2. Reduce licensed capacity or prohibit new admissions when the Commissioner concludes that the agency cannot make necessary corrections to achieve compliance with the regulations except by a temporary restriction of its scope of service.
3. Require that probationary status announcements, provisional licenses, and denial or revocation notices be posted in a prominent place at each public entrance of the licensed premises and be of sufficient size and distinction to advise consumers of serious or persistent violations.
4. Mandate training for the licensee or licensee's employees, with any costs to be borne by the licensee, when the Commissioner concludes that the lack of such training has led directly to violations of regulations.
5. Assess civil penalties of not more than $500 per *violation* (emphasis added to call attention to difference from adult residences) upon finding that the licensee is substantially out of compliance with the terms of its license and the health and safety of children are at risk.
6. Require licensees to contact custodial parents or guardians in writing regarding health and safety violations.
7. Prevent licensees who are substantially out of compliance with the terms of its license or in violations of the regulations from receiving public funds."

Adult Care Residences

The legislation has the following stipulations about special orders:

- they are limited to 12 months duration
- they are reserved to a violation that ". . .adversely impacts, or is an imminent and substantial threat to, the health, safety or welfare of the person cared for therein. ."

The legislation permits the following intermediate sanctions when the associated conditions are met. (Note that the language does not preclude using two or more sanctions concurrently; neither does it preclude applying an intermediate sanction concurrently with a revocation or denial if the circumstances warrant.)

1. Place "a restriction or prohibition on admission of new residents to any adult care residence,
2. And/or a reduction in licensed capacity of any adult care residence"
3. Impose a civil penalty "that shall not exceed $500 for each *inspection* (emphasis added for contrast with child welfare facilities) resulting in a finding of violation.

General Guidance

All enforcement is aimed at achieving compliance to protect the public. In general, intermediate sanctions should be selected and used as an *early* intervention designed to bring the facility into prompt compliance to avert involuntary closure actions, for example:

- to avert the need to resort to denial/revocation, or
- to interrupt a performance trend that appears likely to lead to denial/revocation of the license.

An intermediate sanction is corrective rather than punitive in nature, bearing in mind that this includes such aims as gaining management attention and/or removing incentives for violations as well as reducing scope of risk and increasing skills.

The apparent intent of the General Assembly in enacting this legislation is *to improve overall compliance in facilities* by giving the department workable intermediate tools. Thus, staff will be expected to use intermediate sanctions fully/conscientiously, within the guidance contained in the legislation, to achieve that purpose:

- Intermediate sanctions are clearly not to be used for minor violations that neither create nor threaten to create adverse impacts, noting that the impact must *occur* in Chapter 10 sanctions while the impact *or the imminent or substantial threat of impact* is actionable in Chapter 9. Intermediate sanctions are, however, intended for use when one or more violations are serious and have such impacts, e.g., medication errors, ratio violations, lapses in health care monitoring or supervision, presence of poor sanitation or other hazards, etc.
- However, staff are not required to use an intermediate sanction if a serious violation(s) is corrected promptly and systemically so as to prevent recurrence. (Due regard for fairness through consistency in decision-making *is*, however, required in the use of intermediate sanctions as it is in all regulatory actions.)
- A particular violation does not need to be egregious and/or the overall compliance or pattern of compliance does not need to be at a dire level to impose intermediate sanction(s). Instead, revocation/denial, with evaluation and consideration of whether to request injunction, is the appropriate response for facilities with violations fitting this description.

Consumer protection is to be kept paramount in the ongoing evaluation of each case. When the public is in danger, licensing staff must take immediate action to restore safety. Unless staff have reasonable grounds to believe that the causal conditions are correctable by means of an intermediate sanction, then the recommendation should be to move the case directly to denial, revocation or injunction. That is, the intermediate sanction should not be *in lieu of* necessary ultimate sanctions (involuntary closures), although a few of the intermediate sanctions may be good additional

protection tools during the pendency of appeals of ultimate sanctions in some cases. Similarly, although a provider may appeal an intermediate sanction, the appeal stays only the imposition of the sanction, *not* correction of the violation. At any point when licensing staff perceive imminent jeopardy, a petition to enjoin should be requested.

Staff should bear in mind that the causal conditions for serious and/or repetitive violations may include lack of training, under financing, overextended capabilities and/or insufficient management attention or motivation. Fines, for example, act primarily to focus management attention. Fines are likely to be effective when careless or unresponsive management is a major contributing factor in causing the violations or preventing their prompt correction.

Applied alone, the intermediate sanction or group of sanctions, which should be carefully selected, is expected to accomplish one of two results:

- satisfactory compliance
- evidence of clear grounds for revocation/denial.

Thus, intermediate sanction(s) should not be imposed serially. If the strategy is not promptly effective, revocation/denial should be considered as the next step.

In selecting the intermediate sanction(s), consider which option(s) will: promptly reduce the health/safety risks, address the causal condition(s), and be most effective for that facility's circumstances (example: restricting admission may have little effect if the facility is already at/near capacity and has a history of low vacancies).

Internal procedures

The steps for imposition of intermediate sanctions are: (The italicized portions below indicate standard information that is to be included in the letter advising the licensee of the sanction or in the final order.)

1. Supervisor submits a draft of the letter that will issue the sanction (for the Commissioner's signature in the case of monetary fines and for the division director in all other intermediate sanctions).
2. If multiple intermediate sanctions are being recommended, these should be issued as one letter, one informal conference, etc. If, however, the recommendation is for revocation or denial PLUS intermediate sanction(s), handle them as two separate actions even if they are initiated at approximately the same time. For example, an intermediate sanction involving staff training or a hold on admissions might be considered when a facility is being revoked or denied renewal, i.e., could add a measure of protection while the involuntary closure action is under appeal.

3. Licensee's decision
    - *If there is no timely appeal, the sanction proceeds on the date(s) included*
    - *If there is an appeal, an informal conference will be scheduled*
4. The licensing supervisor, or designated substitute, chairs the conference and, after objectively weighing the licensee's facts, evidence and arguments, prepares a report summarizing the presentation and findings and makes a recommendation, which may be one of the following:
    - to rescind the imposition of sanction as unwarranted or unnecessary;
    - to reduce the proposed terms/stringency of the sanction
    - to substitute a different sanction (also appealable if that option is implemented)
    - to proceed with imposition of the sanction.
5. The conference chair shall also draft a letter to the licensee which, when finalized, is in the form of a final order to be signed by the Commissioner.
6. *The final order may be appealed to court*. (The sanction would go into effect upon the date included in the Commissioner's final order even if appealed, unless, upon request by the licensee, the court directed otherwise or the department agreed to suspend the sanction pending court review.)
7. *If the final order is not appealed, non-compliance with the order will be considered grounds for revocation or denial of licensure*, which would be appealable through all APA steps, i.e., including an administrative hearing.
8. The appropriate licensing office is responsible for closely monitoring compliance with the final order as well as general compliance with the regulations.
    - The supervisor will report monitoring results to the Operations Manager and Division Director as needed and at specified intervals until the case is considered resolved by attaining and sustaining satisfactory compliance or is involuntarily closed by additional action.
        - Since no intermediate sanction may apply for more than 12 months, monitoring inspections are normally expected a month after imposition and quarterly thereafter until expiration.
        - Reports of each monitoring inspection, including any additional inspections made for cause, are expected to be filed with the Operations Manager and Division Director within two weeks.
    - If performance problems persist or worsen, either during or following the period in which the intermediate sanction is in force, staff should immediately consider the need to revoke or deny the license or to seek injunction to achieve consumer

protection.

- If findings show improved and sustained compliance sufficient to warrant lifting the sanction before the special order expires, send a recommendation with rationale to the division director in the form of a draft letter to the licensee.

VI. Chairing Informal Conferences

Beyond the problem solving conferences currently included in the *General Procedures* regulation to resolve disputed inspection findings, the Informal Conference is the first step when a licensee or applicant appeals an intermediate or ultimate sanction.

The chair (usually the licensing administrator who originated the action) is obligated to approach the conference with a fair and open mind and with a willingness to review and reconsider information and decisions that the inspector, the licensing administrator, the operations manager, and the division director made. If we made an error, had a misperception, or made a decision or took an action that can now be improved, the informal conference gives us the valuable opportunity to make things right/better. In short, this is *never* a perfunctory review but a very serious, objective reconsideration of past actions, to include weighing any new or expanded information the appellant provides. It is a continuation of the search for truth, not a defense of past decisions.

Prior to the Conference

- Advise/assist Hearings Coordinator in arranging the conference.
- Keep Coordinator and director informed of progress or problems throughout the process.
- Review case record, including additional information or consent proposal submitted by the licensee.

Room Preparations

- Test tape recorder; have extra tapes and batteries available.
- Set out sign-in attendance sheets, one for participants, one for observers (examples follow).
- Arrange seating suitably, keeping participants separate from observers.

Beginning the Conference

- Perform introductions.
- Explain purposes of the conference — refer to the purposes stated in the letter and overall procedures or otherwise make the following points:
    - To give licensee an opportunity to present facts or arguments to show that the findings or conclusions which resulted in the decision to sanction were unwarranted.
    - To allow the licensee to propose a consent agreement. [Note: As explained in the letter concerning the informal conference, to be acceptable, a proposal must: (a) correct all founded violations; (b) *systemically* correct all *causes* of violations to prevent recurrences; **and**, (c) establish a management monitoring program as the cornerstone of a convincing plan to assure full and ongoing compliance.] A consent agreement proposal is more likely in cases involving forcible closure than in intermediate sanctions.

♦ The procedural points to cover are:

- Only the findings and conclusions detailed in the letter of intent to revoke/deny or apply an intermediate sanction may be addressed.
- Burden is on the facility to show that the division's earlier decision was based on factual error or on misjudgment of facts.
- Any exhibits or other documents submitted by the facility are subject to later validation as necessary and by appropriate/necessary means.
- The conference is being taped only to assist the chair in preparing a recommendation to the division director and tapes will be erased after serving that purpose.
- The first of two possible outcomes of the conference is that the intent to sanction (ultimate or intermediate) will be withdrawn:
    - If the fact-based information added through the informal conference is persuasive that the sanction is not a justified course of action; or,
    - If the facility has requested and develops an acceptable consent agreement. (Note: While consent agreements are available on intermediate sanctions, the logic of a consent agreement would be questionable in fines because fines are often levied to nullify the financial gains of previous violations. However, a consent agreement might be workable in other types of intermediate sanctions if the licensee proposed an equally/more acceptable means of achieving systemic correction.)
- The second possible outcome is that the intent to sanction will proceed:
    - If the information presented in the conference is insufficient to reverse the

decision to sanction; in the case of fines, the amount of the fine might also be reduced; or,

- If proposed, consent agreement terms cannot be reached.

- If the licensee/applicant wanted to propose a consent agreement, it should have been submitted at least ten days prior to the conference but will be accepted no later than the day of the conference. (If there are truly extenuating circumstances, however, the division director may agree to a later date if that request is made by the informal conference.)
- Typically, the licensing inspector attends the informal conference. It is important to remember, however, that the informal conference is the licensee's forum. Both the inspector and the licensing supervisor are there to listen for new/expanded information for later evaluation. If necessary, they can seek or offer brief clarifications, but they should never appear to be offering rebuttals or justifications for actions.
- After the conference, the division director will carefully review and consider the recommendations of the conference chair, and other licensing administrators if appropriate, including all documents, exhibits and evidence. Following that review, for which the law allows 90 days, the director's decision will be mailed to the facility.
- If the decision is to proceed with an intent to revoke/deny a license, the operator will still have access to an administrative hearing if it is requested.
- If the facility's presentation requires the use of the names of persons or families served by the facility, the operator is to advise the chair before the conference proceeds so that all observers and any witnesses can be excused to protect confidentiality. (They do not need to be excused during any portions of the conference where confidentiality is not at risk, meaning that the chair should get a clear understanding of how the operators intends to present information.)
- Ask if there are any questions about the conference or the procedures.
- If not, ask the facility representative to identify the first element of the letter that the operator wishes to address.
- Be sensitive to the need to call recesses.

After the Informal Conference

A. Prepare and submit the conference report to the division director within 2-3 weeks. The report should briefly cover the basic facts, starting with date, place, location, participants, observers,

and the following points.

1. list of points/standards the licensee presented (as disputed findings or conclusions)
2. for each point of the licensee's presentation, a brief summary of what the licensee presented by way of evidence, explanation or documentation with the chair's conclusions in terms of whether the evidence presented did suggest error or misjudgment by the division;
3. a statement of whether a consent agreement was proposed and, if so, the chair's recommendation, with rationale, either: (a) to reject the proposal, or (b) for a process and/or timetable to develop a promising proposal into final form. (Note: If the licensee did not propose a consent but the chair strongly believes the feasibility of reaching consent should be explored, please advise/discuss with division director.)
4. conclude the report with the chair's overall recommendation or recommended options with brief rationale. (That is, there should be a clear statement about whether the chair believes there has been error or misjudgment of facts in terms of the original decision to impose an intermediate sanction or to revoke/deny in which case the chair's report must also address whether the basis for the decision was in sufficient error or misjudgment that it would be unjust to proceed.)

B. Prepare draft letter, on disk, from division director or, in the case of fines, the commissioner to licensee communicating decision resulting from the informal conference. This draft should come at the same time as the chair's report unless there is post-conference work to be done/recommended. In the latter case, chairs can submit their draft letters separately. These letters should be submitted as soon as practicable but no later than three weeks prior to expiration of the 90-day overall time allowance for the informal conference process. Draft letters should generally follow this format:

1. opening section with purpose and legal basis, date/place of the conference, participants, etc.;
2. section summarizing the conference (synopsis of licensee's points and chair's conclusions about those points, i.e., A, 1 & 2 above);
3. if relevant, a discussion of A, 3;

4. The decision reached. This section would reflect what was in A, 4 of the conference report and also reflect any changes resulting from post-conference discussions or activities. If there seems to be any discontinuity between the conference report and the final decision recommended in the draft letter, the letter should provide clear rationale. That is, there is nothing wrong in shifting direction for good cause, but the reasoning behind a shift must be clear.
5. "Boiler-plate information about the licensee's/applicant's right to access remaining steps in the appeal process.

VII. Procedures and Guidelines for Consent Agreements

The licensing administrator who originated the sanction is normally the person who takes lead for the division in negotiating consent agreements. The assigned specialist and central office personnel should, however, be consulted and involved to assure a collaborative decision that meets the needs of the situation.

Context

These guidelines specifically apply to cases in which a sanction has been issued, the provider has appealed, and an informal conference has been scheduled or held. One purpose of the informal conference is to consider whether a settlement/consent-agreement can be reached. For reasons explained above, a consent agreement is technically available in the case of intermediate sanctions but is more likely to be considered as an option where the sanction is involuntary closure (denials and revocations); a consent agreement may be illogical in the case of fines that were imposed to nullify the financial gain from a previous violation.

When to Use a Consent Agreement

The purpose of a consent agreement is to recognize when a facility has made the changes necessary to meet the regulations, including those changes necessary to make it reasonable to expect it will maintain future compliance. The focus remains on consumer protection. The baseline question is: *Is a consent agreement feasible/practical and likely to bring about consumer protection at least as well and as quickly as proceeding with the sanction?*

While the provider is entitled to propose a consent agreement, the time and level of effort licensing staff put into assisting in its development should be proportional both to the nature of the risks and to the expectation of developing a fully satisfactory proposal.

There is no basis for a consent agreement if there is insufficient reason to trust the character and intent of the provider. Accordingly, the director is unlikely to enter into a consent agreement if:

- The provider has knowingly committed, contributed to, condoned, or concealed abuse, neglect, exploitation or serious escalation of risk to consumers or is involved in illegal activities;
- The provider has been untruthful or evasive about the circumstances at the facility.
- The provider failed to make a serious effort to carry out reasonable terms and conditions attached to any previous formalized *compliance agreement* that might have been negotiated with the responsible licensing unit.
- The risk to consumers is so high that a request for petition to enjoin is underway.
- The division lacks the authority to resolve the issue. For example, an applicant may appeal if a license application was denied because of unsatisfactory compliance with the building code or because a barrier offense appeared in the criminal record history search. While law gives applicants the right to appeal, the department has no authority to exempt them from another agency's regulation or from law. (If the barrier offense is subject to the waiver provision in the law, a waiver may be requested.)
- The operator has not already reduced the most serious risks to consumers, i.e., immediate correction of very serious violations should precede extensive efforts to reach accord on a consent agreement.

The director will be very cautious about accepting agreements with facilities with an extended history of compliance problems of the type that cast strong doubt on the ability or motivation of the provider to achieve and maintain compliance. At the very least, a convincing plan of compensatory protection would be required. However, if the fact of the sanction has caused the licensee to take the problems more seriously or if the proposed agreement seems to responsibly compensate for known deficits in the provider's array of skills, a consent proposal might be workable. For example, perhaps a significant variable has changed. Relevant changes might include, e.g., the facility recently hired a capable manager considered able to salvage the operation in a time frame that is reasonable when weighed against the risks to consumers, or the operator decided to limit the facility's population in size or in complexity of service needs.

Role of Negotiator

General

The person who normally represents the division in negotiating a proposed consent agreement for the director's consideration is the unit supervisor responsible for the case, although in some instances the operations manager/designee may take lead in the negotiations, with the unit supervisor's

assistance.

The most valuable function of the negotiator is first to understand, target and communicate the *underlying causes* for the facility's unsatisfactory history and then to guide the provider to convert these underlying causes into sound and often creative preventive risk-reduction and compliance strategies and criteria for a proposed agreement.

- The negotiator should have a grasp of what s/he and the director would be able to accept as the basis for a sound proposal, that is, should have a clear sense of bottom line expectations.
- The negotiator should be able to explain the reasoning behind these expectations and any related suggestions s/he may make.
- And, by helping the provider to understand the causal factors, the negotiator may increase the probability that the provider will develop and advance sound suggestions and solutions without the negotiator's having to voice them.

Notwithstanding these leadership and representational roles, in the end the negotiator remains an intermediary and facilitator. The provider's right to propose a different plan must be respected. Similarly, care must be exercised to avoid stating or implying that a proposed consent agreement's terms are acceptable until *after* the director has seen a draft and signaled conditional approval to proceed to verification stage. (See below for clarification that actual acceptance of the proposal is withheld until verification of performance is available.) Discuss any questions or issues with the director or operations manager during negotiations for guidance on specific cases.

Assistance

The negotiator usually provides some assistance to the provider or the provider's representative in preparing the content and format of the agreement. Bear in mind that the provider, who may be working without an attorney at this stage, may need help to understand the appeal processes and their relationships as well as the expectations for any proposed consent agreement he or she may wish to advance.

It is appropriate for the division's negotiator to provide general assistance to the provider or the provider’s representative concerning target issues, expectations, process, and format. Judgment must be exercised, however, to avoid overdoing assistance. The provider must fully understand and take full ownership for the proposal. This may not occur if he or she merely signs a document conceptualized and prepared by others. (This can also be an issue when the negotiator is working through the provider's attorney or other representative and is a secondary reason for withholding final approval until performance verification occurs.) The provider/representative should prepare the document.

Maintaining Pace

The division's negotiator is also responsible for setting a brisk pace for developing the proposed

agreement. Doing so affords better consumer protection and is also another way of communicating to the provider the seriousness and urgency of the situation. No specific time limits can be suggested because case circumstances vary. The statute allows 90 days for response after the informal conference, and in most cases this should be ample time to develop the proposal. However, additional time may be needed to verify that the proposal is being fully implemented and has achieved the intended results. The negotiator should set a course that does not unduly rush the proceedings, because this could result in a poorly conceived, superficial plan. On the other hand, the negotiator should be alert to signs that the plan is developing too slowly and be willing to set reasonable deadlines.

Maintaining Communication

The negotiator should keep the director and the Hearings Coordinator informed of status and schedules for case tracking purposes. The director should be informed/consulted as needed to resolve or clarify issues related to the development and verification of the proposed agreement. A recommendation, which may be oral, must be made if a consent agreement is submitted. In any event, a written report of the informal conference, of which consent proposals are often part, must be submitted.

General Expectations for a Well-conceived Consent Agreement

Shows results in practice, not merely on paper

- A consent agreement proposal asserting that cited violations have been corrected is not sufficient.
- A proposal that merely promises to correct future violations is not sufficient.
- Likewise, a written plan alone, no matter how extensive, logical or professionally presented, is not be sufficient.

When licensure has been denied or revoked, the presumption is that extraordinary assurance of systemic correction is required to *prevent* recurrent violations. Accordingly, no agreement will be signed until there is evidence that an acceptable plan is also:

- being effectively implemented, and,
- achieving the intended results. (*Note:* If a plan is being conscientiously implemented but is *not* achieving the intended results, that is sufficient reason to revise and resubmit the plan before it is signed. The goal is *not* to implement a plan. The goal is to achieve systemic corrections and prevent future violations. A good plan is merely a description of steps that will be taken to get to the goal.)

Responds to causes, shows strong probability of preventing further violations

The plan must focus on causes, not symptoms, and must show that the licensee/applicant now has a strong grasp of principles and practices both in basic preventive planning and in monitoring for results. The plan should show, by program systems, who has been delegated the responsibility to take what actions, e.g., like a task checklist.

Moreover, the facility's internal **monitoring system** must show two things:

- the methods and processes the licensee or a designated manager/supervisor will take to *detect* deviations from the plan and violations, e.g., clear assignments, schedules and methods outlining who will observe and verify compliance
- the linkage showing how *detection by the monitor will result in immediate correction* within the facility's organization, e.g., communication, decision-making (such as determining whether the failure is due to training, performance, flawed procedures, etc.)

The targeted causes and solutions that form the basis for a consent agreement will be unique to the facility and its management situation.

The solutions will almost always, however, go beyond the regulations because the facility has already demonstrated that it could not use the existing regulations alone as a means of staying in compliance. Conceptually, a consent agreement is similar to a stipulated variance, i.e., the negotiator is designing and recommending additional requirements that are considered necessary to protect consumers in that *particular* facility with its *particular* history and circumstances. For example:

- If the facility's governing board lacked expertise in human care and that lack was considered strongly implicated in the pattern of violations that led to adverse action, the proposed consent might require a change in board composition or the addition of advisors/consultants to the board in matters concerning the operation. Or, perhaps the board appeared to have adequate expertise but was insufficiently involved in overseeing operations. In that case, the proposed consent agreement might require a specific plan to assure that the board regularly acquires/receives and acts on valid reports about the operation.
- If the program administrator/director, who presumably met qualifications, failed to maintain compliance, the negotiator might want an agreement requiring a highly skilled consultant to mentor the incumbent and/or specific education/training related to the identified area(s) of skill-deficiency demonstrated.
- Perhaps the problems did not appear to arise from the overall supervisory or managerial capacities of the program director but, instead, from the training level of the staff as a whole. If so, the negotiator might feel that the agreement should require a plan for systematically training current and future staff, perhaps with outside trainers if the negotiator believes that the program director lacks the time or skills to implement this managerial responsibility effectively.

- If the negotiator believes the facility owner/director could carry out but could not design effective internal systems (e.g., preventive maintenance, personnel supervision, record-keeping, systemic monitoring, etc.), the agreement might include a provision for outside assistance in targeted areas. Or, if the facility had internal resources, the agreement might simply require that these elements be addressed in a plan acceptable to the negotiator. Or, if the operator seems incapable of learning to manage some aspect of the operation, a requirement to hire someone to assume that responsibility might be appropriate.

Covers a defined period

A consent agreement must cover a defined period of time. In general, a two-year time-frame is suggested; if circumstances warrant an adjustment, a minimum of one year or a maximum of three years is suggested. The rationale is that a facility in adverse action typically has systemic and organization-culture problems that developed over time and that are not likely to be overcome quickly. On the other hand, any worthy facility should be able to recover within a two-three year span of time, and to extend the agreement longer could be perceived as excessively controlling. The ultimate goal is always for the licensee to be independently capable of sustained compliance.

Specific Content Requirements

The content should contain initial and ending "boiler plate" language, including:

- dates of key actions, e.g., letter of sanction, timely appeal, the informal conference (if already held), and the names of the parties.
- the assertion that all violations detailed in the letter of denial/revocation have been corrected or will be corrected by a time specified in the proposal.
- a statement agreeing to future maintenance of substantial compliance with all regulations.
- statements outlining and acknowledging the process and time lines for moving the proposed agreement through the steps that will follow submission of the proposal signed by the provider, including statements that:
- the director will evaluate the proposal and respond by letter;
- the provider understands that if the proposal is conditionally accepted, final approval and the director's signature will be withheld until after satisfactory on-site verification of results, including the information that the duration of the agreement will begin when the director signs/accepts the agreement;
- if the on-site verification is unsatisfactory, the director may elect to abandon efforts to develop a consent agreement in favor of pursuing the sanction or may allow the

provider to refine the proposal to achieve the intended results, depending on the extent to which the proposal was being implemented;

- the duration of the consent agreement, with the information that this period begins when the director signs. (Note: A special order may not last longer than 12 months. However, the time limits on a consent agreement are discretionary and unrelated to intermediate sanctions. For example, as an intermediate sanction, a restriction on admissions could not last longer than one year. However, if a facility appealed a revocation, it might propose a consent agreement that included a restriction on admissions for longer than a year.)
- a statement that when the director signs the agreement, signifying final acceptance, the director is also agreeing to rescind the outstanding denial/revocation and that the provider is agreeing to withdraw all appeals to that action.
- a statement outlining the conditions for termination of the final agreement for cause and the nature of the provider's appeal rights in that event.

The middle part of the document's content should describe in necessary detail the case-specific systemic solutions proposed to address the causes of the past history of violations, including the methods the licensee has in place to prevent violations **and** to monitor for results.

The negotiator may suggest that the proposal be crafted to allow verification to occur in two or three segments/sequences. For example, the negotiator may want the most risk-laden problems to be addressed sooner than longer range aspects of the plan. If so, the expectations and time-frames for interim as well as final verifications should be included.

The licensing unit is not required to offer any assistance/participation in the proposed agreement but if assistance is requested/offered and accepted, it should also be included in the proposal, e.g., resource materials, referrals, consultation, etc.

Recommendation and Approval Process

If negotiations reach a point where further progress seems doubtful, the negotiator should make it clear that:

- the provider can submit his/her proposal in its present state but that the negotiator will not be able to recommend it; also state the nature of the reservations about the proposal; and,
- the negotiator intends to recommend, instead, that the case proceed to administrative hearing.

Assuming that the negotiator does recommend the proposal, the steps are as follows:

1. The negotiator reviews a draft and either makes final suggestions or advises the operator that the

negotiator can recommend it to the director. (If it would be helpful or prudent, the director is willing to review preliminary drafts to ensure that the product is developing along generally acceptable lines. This can reduce the chance of encountering problems at the latter stages.)

2. Two originals of the final proposal, signed by the provider and dated, are mailed to the negotiator.
3. The negotiator should review the submission to assure that it conforms to his/her expectations and make a working copy for use during verification. The two original final proposal should then be mailed to the director, along with the negotiator's recommendation. The recommendation should be in writing, but a telephone call is acceptable.
4. The director will review the proposal and write to the provider, copying the negotiator, either affirming conditional approval to proceed to verification stage or stating changes required before it will be conditionally approved.
5. Licensing staff perform on-site verification, advise the director of results and submit a written recommendation with rationale.
6. If results warrant, the director prepares a cover letter enclosing one of the original consent agreement, signed, and forwards copies to the licensing unit as well as to all other parties copied on the adverse action letter.
7. If the on-site inspection is unsatisfactory, the director will so advise the provider by letter.
    - If the decision is to abort negotiations and proceed to administrative hearing (or if an intermediate sanction, to the commissioner's final order), the letter will include appeal information.
    - If the inspection showed only minor deviation from expectations and the director believes that additional time or further negotiation is warranted to achieve those expectations, the provider will be offered the opportunity to resume the process, either with the negotiator or by response to the director, depending on the extent of the issues.

Oversight Responsibilities During the Effective Dates of Consent Agreements

Throughout the duration of the consent agreement, licensing staff should increase their visibility in the facility and continually evaluate whether the consent agreement is being implemented satisfactorily and whether its intended results are being achieved. Staff should give the facility specific feedback on observations with respect to implementation during each visit to the facility. The rationale is that the provider is more likely to stay focused on implementing the agreement if licensing staff are obviously paying attention to implementation.

Licensing staff should plan extra inspections and close contact both with the provider and by reports

to the director on all active consent cases as follows:

1. As planned and necessary to verify results for purposes of advising the director whether the conditional consent agreement should be signed and the adverse action rescinded.
2. Several times during the first six months after the agreement is signed. This can vary according to the licensing staff's judgment but should be not less than one month, three months and six months after the final agreement is signed. These visits are to monitor consumer safety and to demonstrate that the division remains concerned about the facility's adherence to the agreement.
3. At least one inspection should be made during the remainder of the first year of the agreement, meaning that a minimum of four visits are required during the first year of a consent agreement.
4. At least one extra visit should be made during the second/remaining year(s) of the agreement.
5. In addition to brief reports to the director on each of these inspections, any new complaint against the facility should be reported to the director upon receipt, with a copy of findings after investigation. The written report on findings should include an additional brief report, in the case of *valid* complaints only, of whether or how the unit supervisor perceives the consent agreement and the complaint to be related.